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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 138

FRANCIS DOLL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 23–34) is reported at 2 T. C. 276. The opinion of the Circuit Court of Appeals (R. 139–151) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1945. (R. 151–152.) The petition for a writ of certiorari was filed on June 19, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court validly held that all of the income of a business engaged in selling shoes on a commission basis was taxable to the taxpayer notwithstanding the existence of a partnership agreement between taxpayer and his wife.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *
>
> * * * * *
>
> SEC. 181. PARTNERSHIP NOT TAXABLE.
>
> Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.
>
> * * * * *
>
> SEC. 1001. DEFINITIONS.
>
> (a) When used in this Act—
>
> * * * * *
>
> (3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, finan-

> cial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or oganization.
>
> * * * * *

The same provisions also appear in Sections 22, 181 and 901 of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Sections 22, 181 and 3797 of the Internal Revenue Code (26 U. S. C., Secs. 22, 181 and 3797).

STATEMENT

The pertinent facts as found by the Tax Court (R. 24–31) may be summarized as follows:

Prior to 1932, the taxpayer resided in Cuba and was there engaged in a partnership with his two brothers in selling shoes. Early in 1932 he came to St. Louis, Missouri, having previously married an American citizen, and himself became a citizen. (R. 24–25.)

With his brother-in-law, the taxpayer planned to engage in the business of selling St. Louis beer in Puerto Rico and on January 29, 1932, opened a checking account with the First National Bank in St. Louis under the name of St. Louis Trading Company, upon which both could draw. Since the beer-selling business did not materialize, the arrangement between taxpayer and his brother-in-law was terminated. Taxpayer, however, developed a market for shoes in Puerto Rico and later in

Cuba. He sold the products of more than 40 manufacturers, employing a salesman in Puerto Rico and engaging the services of his brother, Antonio Doll, in Cuba. Contracts with manufacturers were made by the taxpayer personally. Sales were strictly on a commission basis, and checks in payment of commissions were variously issued to taxpayer personally and to the St. Louis Trading Company. (R. 25.)

Continuously from some time in 1932, taxpayer maintained an office in an office building at 1515 Washington Avenue, St. Louis, acting as agent for the owner in the management of the building in lieu of paying rent. His office was equipped with furniture and fixtures and with shelves for sample shoes. Taxpayer also had filing cabinets at his residence in which some business papers were filed. (R. 26.)

Under date of December 15, 1932, a paper entitled "Partnership Agreement" was signed by taxpayer and his wife. This agreement states that taxpayer, being the "sole owner of the Saint Louis Trading Company", agrees to take his wife as partner in his business and Mrs. Doll "accepts to join the partnership of his [sic] husband in the Saint Louis Trading Company enterprise". The agreement describes the nature of the business as being "To sell on strictly commission basis, shoes made by American manufacturers for Export Trade," and provides that both interested

parties are to participate equally in the profits, losses and liabilities of the business. As to management, it is stated the taxpayer will undertake the management of the business "to do as he sees fit," with full authority to appoint agents in foreign territories, and in case of his death, that Mrs. Doll will then undertake the same authority in regard to the management, and "it will be her privilege then, to make the necessary appointments to continue this [business]." (R. 26–27.)

At about the time of this agreement, taxpayer listed the name of the St. Louis Trading Company in the local telephone directory. A cash book was kept in the name of St. Louis Trading Company, but no other books were kept and no proprietorship or other account was set out showing the interest of any persons in the business. (R. 27.) Except for a short period in 1932 or 1933, when Mrs. Doll drew some checks on the bank account which continued to be maintained under the name of the St. Louis Trading Company, all checks on the account were drawn by the taxpayer. An officer of the International Shoe Company, whose shoes were among those sold by the taxpayer, was told by taxpayer and Mrs. Doll, probably during the summer of 1932, that they were operating as a partnership under the name of St. Louis Trading Company. (R. 29.) At no time was there any display of a sign at the business office indicating the conduct of a partnership business. (R. 27.)

Mrs. Doll contributed no capital to the shoe selling business and did not enter into transactions on behalf of the business. (R. 27.) Taxpayer made two or three business trips a year to Cuba and Puerto Rico. Mrs. Doll had, up to the time of the hearing, accompanied him on about four of these trips, during which she helped write orders and rendered other assistance. During taxpayer's absence upon the remaining trips, she worked for the business both in the office and at home. She also helped at the office when Mr. Doll was there and the work grew heavy, checking orders, keeping books, answering letters, and filing papers both at the office and at the residence. She assisted in entertaining customers socially and sometimes accompanied them to the selling offices of shoe manufacturers. Upon such occasions the selling was done by salesmen of the manufacturers. (R. 28.)

Taxpayer's personal expenditures, as well as receipts and expenditures connected with the business, were recorded in the cash book kept in the name of the St. Louis Trading Company. (R. 27.) Taxpayer kept no personal bank account, although Mrs. Doll did. He maintained a separate account, however, for the deposit and disbursement of funds received from customers for payment of freight and of the bills of manufacturers. (R. 29.)

For her services in connection with the business, Mrs. Doll received $200 per month, fixed by

agreement between her and the taxpayer at an apparently early date in the conduct of the business. (R. 28.) There were no annual or other distributions or any setting aside between taxpayer and Mrs. Doll of the income from the shoe-selling business or any crediting of such income to them on the cash book or elsewhere. (R. 27.) For Federal income tax purposes Mrs. Doll consistently reported as her income the $200 per month received as compensation from the business. The taxpayer, as his income, reported the entire income from the business and deducted as a business expense the $200 per month paid to Mrs. Doll. His returns were captioned "Francis Doll, Trading as St. Louis Trading Company." (R. 28.) Matters pertaining to the conduct or disposition of the business upon the death of the taxpayer are covered in his will, the terms of which are not shown of record. (R. 29.)

After the returns for the years 1937, 1938, and 1939 had been filed, the taxpayer employed an accountant named Norton in connection with his income tax matters. Upon learning of the agreement of December 15, 1932, Norton advised the taxpayer and Mrs. Doll that they were entitled to report the income from the shoe-selling business on a basis of 50 percent to each, with consequent saving of Federal income taxes. He prepared partnership returns for the years in question showing the income from the shoe-sell-

ing business as partnership income. He prepared amended returns for both taxpayer and Mrs. Doll, reporting the income from the shoe-selling business in equal shares. The taxpayer filed claims for refund of the difference between the amounts paid as shown on his original returns filed for the years 1937, 1938, and 1939 and the amounts shown on the amended returns prepared by Norton for him. The partnership returns so prepared and filed were captioned "St. Louis Trading Company". (R. 29–30.)

The Commissioner determined deficiencies arising out of matters not in dispute here. In the deficiency notice, filing of the claims for refund by the taxpayer was noted, but no allowance in respect thereto was made. (R. 30.)

On June 13, 1941, the taxpayer filed his petition in this proceeding, the sole error alleged being the Commissioner's failure to find that the taxpayer and Mrs. Doll were equal partners in the shoe-selling business during the taxable years in question and to allow the taxpayer's claims for refunds filed. (R. 30.)

On October 23, 1941, Mrs. Doll filed a petition naming the taxpayer as defendant in the Circuit Court of St. Louis County, Missouri, captioned "Petition to Construe Partnership Agreement Dated December 15, 1932 and to Determine Rights of Plaintiff and Defendant in the Partnership Business, Assets and Profits". On No-

vember 11, 1941, the taxpayer, as defendant, filed his answer to the above petition, admitting all material allegations. Hearing was had on February 25, 1942, and on March 10, 1942, the court entered its findings and decree to the effect that on December 15, 1932, the taxpayer and Mrs. Doll had entered into a partnership agreement under which they were equal partners in carrying on a shoe-selling business, under the name of St. Louis Trading Company; that the agreement was then and had been continuously in full force and effect; that, as partners, each had an equal interest in the assets and profits of the business and each was entitled to equal distributive shares of the profits of the business. No notice was given by the taxpayer or Mrs. Doll to any Federal agency or official that any such proceeding had been instituted. Notwithstanding the proceeding in the Missouri court just described, there was never at any time any dispute or controversy between the taxpayer and Mrs. Doll over the shoe-selling business or the profits therefrom. (R. 30–31.)

The Tax Court held that, from the evidence, it was unable to conclude that the shoe-selling business was conducted as a partnership and decided that there are deficiencies in income tax of $184.17, $153.07 and $170.97 for the calendar years 1937, 1938 and 1939, respectively. (R. 32, 34–35.) The court below affirmed the decision of the Tax Court. (R. 139–152.)

ARGUMENT

1. The court below correctly held that it was the function of the Tax Court to determine from all the evidence whether, in reality, the taxpayer earned the income derived from the business activities carried on, or whether a partnership, composed of the taxpayer and his wife, earned the income as a business entity. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. The conclusion turns upon the particular facts, and there is no issue of law involved; for there can scarcely be any quarrel with the principle which was applied, namely, that under Section 22 (a) of the applicable Revenue Acts, *supra*, income is attributable for tax purposes to the person who actually earned it or whose property gave rise to it. *Harrison* v. *Schaffner*, 312 U. S. 579; *Helvering* v. *Eubank*, 311 U. S. 122; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Clifford*, 309 U. S. 331; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376; *Lucas* v. *Earl*, 281 U. S. 111. In this state of the case, if there is warrant in the record for the conclusion reached by the Tax Court, its decision was binding upon the Circuit Court of Appeals. That court properly limited its review to determining whether there was support for the conclusion in the evidence. *Commissioner* v.

Court Holding Co., supra; Mead v. *Commissioner,* 131 F. 2d 323 (C. C. A. 5th), certiorari denied, 318 U. S. 777; *Tyson* v. *Commissioner,* 146 F. 2d 50 (C. C. A. 8th); *Lorenz* v. *Commissioner,* 148 F. 2d 527 (C. C. A. 6th); *Waldburger* v. *Helvering,* 131 F. 2d 598 (C. C. A. 2d).

The conclusion of the Tax Court was properly based upon the actual substance of the situation in the conduct of the business, and this could not be obscured by the formal arrangements made. *Commissioner* v. *Court Holding Co., supra; Gregory* v. *Helvering,* 293 U. S. 465; *Higgins* v. *Smith,* 308 U. S. 473; *Griffiths* v. *Commissioner,* 308 U. S. 355. Moreover, if the business income was in fact earned by the taxpayer, his tax liability could not be altered by an arrangement to share the income with his wife, whether by assignment, gift, trust, or "partnership" agreement. Having earned the income, taxpayer was liable for the full amount of the tax upon it.

2. The findings of the Tax Court from the evidence are amply supported by the record. With one exception,[1] the petition for certiorari does not assert that any erroneous findings were made by the Tax Court or that there is any lack of founda-

[1] The taxpayer complains of the finding that his wife drew a salary of $2,400 a year and asserts that it is not supported by the record. (Br. 19, 26.) However, both he and his wife testified that that amount was paid to her as salary, that it was so entered on the books of the business, that she reported that amount, and no more, as her income in her tax returns, and that taxpayer took a deduction for that amount as sal-

tion for those findings. The taxpayer also fails to specify in what respects there is an absence of rational basis for the conclusion of the Tax Court that "the income was his [taxpayer's] income." (R. 32.) The meticulous care with which the Circuit Court of Appeals reviewed the evidence to conclude that there was a rational foundation for the Tax Court's decision, makes it unnecessary that those matters be restated here.

3. No conflict in decisions is presented. Some of the cases which the petitioner alleges to be contrary to the decision below (Br. 22–24) have ceased to be authority because of the subsequent decisions of this Court in such cases as *Helvering* v. *Clifford, supra; Harrison* v. *Schaffner, supra; and Helvering* v. *Eubank, supra.* Family partnerships are not immune from the principles established in those cases, as the lower courts have been quick to recognize. Compare *Commissioner* v. *Olds,* 60 F. 2d 252 (C. C. A. 6th) (Br. 22), with *Lorenz* v. *Commissioner, supra; Champlin* v. *Commissioner,* 71 F. 2d 23 (C. C. A. 10th) (Br. 23), with *Losh* v. *Commissioner,* 145 F. 2d 456 (C. C. A. 10th); and *Kell* v. *Commissioner,* 88 F. 2d 453 (C. C. A. 5th)

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aries paid. (R. 47, 48, 60, 68.) The Tax Court, obviously, was not required to give credence to the conflicting testimony that this was only a partial withdrawal of her interest in the partnership profits (R. 60) or that she actually received the amounts which, in the action which was brought for a declaratory judgment, were alleged to have been withdrawn by her (R. 98–99; Pet. Br. 19).

(Br. 24), with *Mead* v. *Commissioner, supra,* and *Argo* v. *Commissioner* (C. C. A. 5th), decided June 20, 1945, not yet reported. The decisions relied on by petitioner, moreover, are distinguishable on their facts. No useful purpose would be served by a discussion of differentiating circumstances in a field where "no one fact is normally decisive," *Helvering* v. *Clifford, supra,* at p. 336; but it should be observed that in many of the cases cited the wife had made a contribution of capital to the partnership, a fact which is not present in this case.

4. The declaratory judgment which the taxpayer's wife obtained in the Circuit Court of St. Louis County, Missouri, defining her rights in the partnership, quite clearly did not affect the tax liability of the parties. Even if it be assumed that there was a valid partnership agreement and that the taxpayer's wife was entitled, under state law, to the rights of a partner, that would not of itself answer the decisive question whether the earnings here were really those of the taxpayer. Thus, no one would deny that a valid trust was created in *Helvering* v. *Clifford, supra,* and that the beneficiaries had acquired enforceable rights; or that in *Lucas* v. *Earl, supra; Helvering* v. *Eubank, supra;* and *Harrison* v. *Schaffner, supra,* there were valid assignments which were effectual as between assignor and assignee; or that there was a valid gift in *Helvering* v. *Horst, supra.* Accord-

ingly, the declaratory judgment did not and could not decide the issues which determine taxability here. The court below did not ignore the declaratory judgment (Pet. Br. 21), but, on the contrary, held that it was not decisive of the Federal question involved. *Estate of Henry W. Putnam* v. *Commissioner,* No. 534, 1944 Term, decided March 26, 1945; *Helvering* v. *Stuart,* 317 U. S. 154; *Lyeth* v. *Hoey,* 305 U. S. 188. There is no departure from understood principles of Federal tax law in this holding.

CONCLUSION

The decision of the court below is correct in all respects. There is no conflict of decisions, and no question of general importance is presented. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1945

U. S. GOVERNMENT PRINTING OFFICE: 1945

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 138

FRANCIS DOLL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Since the Commissioner on July 14, 1945 filed his brief in opposition to the granting of a writ of certiorari in this case, he has determined to petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Sixth Circuit in *Tower* v. *Commissioner,* 148 F. 2d 388. Although the present case does not involve a situation in which a husband has conveyed an interest in business property to his wife before entering into a partnership agreement with her, as do the *Tower* case and others which

involve a more complex type of family partnership arrangement, the Court may wish to consider the question of certiorari in the two cases together. The present case presents a simpler situation. See also *Tinkoff* v. *Commissioner,* 120 F. 2d 564 (C. C. A. 7); *Waldburger* v. *Helvering,* 131 F. 2d 598 (C. C. A. 2), affirming *per curiam* the decision of the Board of Tax Appeals reported in 1941 P-H B. T. A. Memorandum Decisions, par. 41,438; and cf. Paul, *Partnership in Tax Avoidance,* 13 Geo. Wash. L. Rev. 121, 137. In the present case, unlike the *Tower* case, moreover, the Circuit Court of Appeals has not undertaken, erroneously as we believe, to overrule the decision of the Tax Court upon the question of the genuineness of an alleged family partnership.

Because of the foregoing distinctions and the consequent absence of conflict between the two decisions, although we regard the *Tower* case as one in which certiorari should issue because of the error below and the difficult nature of the problem of family partnerships in which the husband has purported to bestow an interest in business property upon the wife in anticipation of a partnership agreement, we continue to view certiorari as unnecessary in the present case. The Commissioner, however, is not averse to this Court's considering additional phases of the family

partnership problem through granting certiorari in this case if the petition in the *Tower* case should be granted, since family partnerships generally present an important new field of tax avoidance. See Paul, *op. cit., supra.*

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